

1 RONALD WILCOX, Bar No. 176601
2 2160 The Alameda, First Floor, Suite F
3 San Jose, California 95126
4 (408) 296-0400

5 O. Randolph Bragg, IL Bar # 6221983
6 HORWITZ, HORWITZ & ASSOC.
7 25 E Washington St Ste 900
8 Chicago IL 60602
9 (312) 372-8822

10 Attorneys for Plaintiff

11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
13 **SAN JOSE DIVISION**

14 **RAYMOND ABELS, on behalf of**
15 **himself and others similarly situated,**

16 **Plaintiff,**

17 **vs.**

18 **JBC LEGAL GROUP, P.C. and JACK**
19 **BOYAJIAN,**

20 **Defendants.**

) CIV. NO. 04-02345 JW RS

)
) **MEMORANDUM IN SUPPORT OF**
) **PLAINTIFF'S MOTION TO COMPEL**
) **WRITTEN AND ORAL DISCOVERY**

)
) Date: October 19, 2005

) Time: 9:30 a.m.

) Hon. Judge Seeborg

) U.S. District Court

) 280 S. 1st St., San Jose, CA 95113

21 **MEMORANDUM IN SUPPORT OF**
22 **PLAINTIFF'S MOTION TO COMPEL WRITTEN AND ORAL DISCOVERY**

23
24
25
26
27 **PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL WRITTEN**
28 **AND ORAL DISCOVERY - CIV. NO. 04-02345 JW RS**

TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
STATEMENT OF ISSUES TO BE DECIDED	iv
I. <u>INTRODUCTION</u>	1
II. <u>DISCOVERY PRINCIPLES</u>	2
III. <u>OUTSTANDING DISCOVERY ISSUES</u>	4
A. The Amounts Recovered by Defendants <u>Through the Use of Exhibits A and B</u>	4
B. <u>Distribution of Monies Recovered</u>	6
C. <u>Contracts Between Defendants and the Original Creditors</u>	8
D. Documents Relating to Defendants’ Policies and Procedures <u>to Ensure Compliance with the FDCPA, CA FDCPA and CUBPA</u>	9
E. <u>Deposition Questions and Answers</u>	10
1. Defendant’s Objections, Based on “Legal Conclusion,” “Expert Testimony” and “Relevancy,” Must Be Overruled	10
2. Defendant’s Objections, Based on “Work Product,” Must Be Overruled	12
IV. <u>CONCLUSION</u>	14

TABLE OF AUTHORITIES

CASES

<i>Abels v. JBC Legal Group, P.C.</i> , 227 F.R.D. 541 (N.D.Cal. 2005)	5
<i>Black & Veatch Int’l Co. v. Foster Wheeler Energy Corp.</i> , 2002 U.S. Dist. LEXIS 990 (D.Kan. Jan. 21, 2002)	5, 7
<i>Boutvis v. Risk Management Alternatives, Inc.</i> , 2002 U.S. DIST. LEXIS 8521 (D.Conn. May 3, 2002)	8-9, 13
<i>Compagnie Francaise D’Assurance v. Phillips Petroleum</i> , 105 F.R.D. 16 (S.D.N.Y. 1984)	3
<i>Coppola v. Arrow Financial Svcs, LLC</i> , 2002 U.S. Dist. LEXIS 26788 (D.Conn. Oct. 29, 2002)	8
<i>Davis v. Fendler</i> , 650 F.3d 1154 (9th Cir. 1981)	3-4
<i>Elgin FCU v. Carter, Fitzgerald Securities</i> , 91 F.R.D. 414 (N.D. Ga. 1981)	3
<i>Eureka Financial Corp. v. Hartford Acci. & Indem. Co.</i> , 136 F.R.D. 179 (E.D. Cal. 1991)	3
<i>Gervais v. Riddle & Assoc., P.C.</i> , 363 F.Supp.2d 345 (D.Conn. 2005)	5
<i>Grill v. Costco Wholesale Corp.</i> , 2004 U.S. Dist. LEXIS 21400 (W.D.Wa. Oct. 8, 2004)	3, 13
<i>In re Air Crash at Taipei</i> , 211 F.R.D. 374 (C.D. Cal. 2002)	3-4
<i>Kimber v. Fed. Fin. Corp.</i> , 668 F.Supp.1480 (M.D. Ala. 1987)	5, 7
<i>Kimbrow v. I.C. System, Inc.</i> , 2002 U.S. DIST. LEXIS 14599 (D.Conn. July 22, 2002)	8, 9
<i>Methode Elecs, Inc. v. Finisar Corp.</i> , 205 F.R.D. 552 (N.D.Cal. 2001)	11

1	<u>Oppenheimer Fund, Inc. v. Sanders</u> , 437 U.S. 340 (1978)	2
2	<u>Perretta v. Capital Acquisistions & Mgmt. Co.</u> ,	
3	2003 U.S. Dist. LEXIS 10070 (N.D. Cal., 2003)	5,
4	7	
5	<u>Pullen v. Arrow Financial Services, LLC</u> ,	
6	2002 U.S.Dist.LEXIS 27823 (D.Conn. Oct. 17, 2002)	11-12
7	<u>Shorty v. Capital One Bank</u> ,	
8	90 F.Supp. 2d 1330 (D.N.M., 2000)	5, 7
9	<u>Stepney v. Outsourcing Solutions, Inc.</u> ,	
10	1997 U.S. Dist. LEXIS 18264 (N.D.Ill., Nov. 13, 1997)	5, 7
11	<u>Union Pac. R.R. v. Mower</u> , 219 F.3d 1069, 1076 (9th Cir. 2000)	13
12	<u>United States v City of Torrance</u> , 164 F.R.D. 493 (C.D. Cal, 1995)	
13	2	
14	<u>United States v. 58.16 Acres of Land</u> , 66 F.R.D. 570 (S.D.Ill. 1975)	3
15	<u>Walker v. Cash Flow Consultants</u> , 200 F.R.D. 613 (N.D. Ill. 2001)	5, 7
16	<u>Walker v. Lakewood Condo. Owners Ass'n</u> , 186 F.R.D. 584 (C.D. Cal. 1999)	2
17	<u>White v. Beloginis</u> , 53 F.R.D. 480 (S.D.N.Y. 1971)	3

OTHER AUTHORITY

21	15 U.S.C. 1692k(b)(2)©)	9
22	Fed. R. Civ. P. 26(b)(5)	<i>passim</i>
23	Fed. R. Civ. P. 30(d)(1)	10,
24	11	

PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL WRITTEN
AND ORAL DISCOVERY - CIV. NO. 04-02345 JW RS

1	Fed. R. Civ. P. 33(b)(4)	2
2		
3	Fed. R. Evid. 803(6)	8

STATEMENT OF ISSUES TO BE DECIDED

1. Is information regarding the amounts recovered by Defendants through the use of Exhibits A and B (attached to the Complaint) discoverable?
2. Is information regarding the distribution of monies recovered by Defendants through the use of Exhibits A and B (attached to the Complaint) discoverable?
3. Are the contracts between Defendants and the original creditors discoverable?
4. Are the documents relating to Defendants' policies and procedures in place to ensure compliance with the FDCPA, CA FDCPA and CUBPA discoverable?
5. Should Defendants' attorney's objections, based on "Legal Conclusion," "Expert Testimony," "Relevancy" and "Work Product" be overruled?

Plaintiff respectfully asserts that these questions should be answered in the affirmative.

1 **I. INTRODUCTION**

2 Plaintiff Raymond Abels (“Plaintiff”) filed his Class Action Complaint on June
3 15, 2004 against Defendants JBC Legal Group, P.C. and Jack Boyajian (“Defendants”) for
4 violations of the Fair Debt Collection Practices Act, 15 U.S.C. §§ 1692 *et seq.* (“FDCPA”),
5 California Civil Code § 1788 (hereinafter “CA FDCPA”) and the California Business and
6 Professional Code §§ 17200 *et seq.* (hereinafter (“CUBPA”). On May 16, 2005 Plaintiff’s
7 Motion for Class Certification was granted in part.
8

9 On November 3, 2004, Plaintiff mailed to Defendants his First set of Discovery
10 Requests. Defendants mailed their Responses and Objections to Plaintiff’s First set of Discovery
11 Requests on December 20, 2004. (attached as Exhibits 2 - 5 to Plaintiff’s Motion to Compel).
12 Defendants have objected to several of Plaintiff’s requests. Plaintiff’s counsel O. Randolph
13 Bragg and Defendants’ counsel June Coleman have discussed the discovery requests at issue
14 here but have been unable to reach a resolution. On March 16, 2005, Mr. Bragg faxed a letter to
15 Defendants’ attorneys regarding Defendants’ responses to discovery. (attached to Plaintiff’s
16 Motion to Compel as Exhibit 1). On May 5, 2005, Plaintiff deposed Defendant Jack Boyajian.
17 During the deposition several questions proffered by Plaintiff went unanswered by Mr. Boyajian,
18 upon the instruction not to answer by his Counsel. (Excerpts of the transcript are attached as
19 Exhibit 6 to Plaintiff’s Motion to Compel).
20

21 Plaintiff moves this Court to compel Defendants to answer and produce
22 documents in response to Plaintiff’s First Discovery Requests, Interrogatories # 7 and 20, and
23 Request for Production of Documents # 3, 7 and 12, and to order the Defendant to answer certain
24 PLAINTIFF’S MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION TO COMPEL WRITTEN
25 AND ORAL DISCOVERY - CIV. NO. 04-02345 JW RS
26 AND ORAL DISCOVERY - CIV. NO. 04-02345 JW RS
27 AND ORAL DISCOVERY - CIV. NO. 04-02345 JW RS
28

1 deposition questions as outlined below. On May 16, 2005, Plaintiff's Motion for Class
 2 Certification was granted in part.

3 **II. DISCOVERY PRINCIPLES**

4
 5 Plaintiff is entitled to discovery as to "any matter that bears on, or that reasonably
 6 could lead to other matter that could bear on, any issue that is or may be in the case [including] a
 7 variety of fact-oriented issues [which] may arise during litigation that are not related to the
 8 merits." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978). Information sought in
 9 discovery is not required to be admissible at trial and therefore Courts should permit wide-
 10 ranging discovery of all information reasonably calculated to lead to discovery of admissible
 11 evidence. *United States v City of Torrance*, 164 F.R.D. 493 (C.D. Cal, 1995).

12
 13 An objection, whether based on grounds of privilege or otherwise, must be stated
 14 with specificity. Any ground not stated in a timely objection is waived, unless the party's failure
 15 to object is excused by the court for good cause shown. Fed.R.Civ.P. 33(b)(4). Generalized,
 16 boilerplate objections are inadequate and such "objections are inadequate and tantamount to not
 17 making any objection at all." *Walker v. Lakewood Condo. Owners Ass'n*, 186 F.R.D. 584, 587
 18 (C.D. Cal. 1999), citing *Joseph v. Harris Corp.*, 677 F.2d 985, 992 (3d Cir. 1982) ("mere
 19 statement by a party that the interrogatory was 'overly broad, burdensome, oppressive and
 20 irrelevant' is not adequate to voice a successful objection"). It is Defendant's burden to
 21 persuade the Court that the information it has refused to provide is outside the broad scope of
 22 discovery. *Compagnie Francaise D'Assurance v. Phillips Petroleum*, 105 F.R.D. 16 (S.D.N.Y.
 23 1984); *White v. Beloginis*, 53 F.R.D. 480 (S.D.N.Y. 1971); *Elgin FCU v. Carter, Fitzgerald*

24
 25
 26
 27 PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL WRITTEN
 28 AND ORAL DISCOVERY - CIV. NO. 04-02345 JW RS

1 Securities, 91 F.R.D. 414 (N.D. Ga. 1981); U.S. v. 58.16 Acres of Land, 66 F.R.D. 570 (S.D.ILL.
2 1975).

3
4 When discovery is withheld based on a claim of privilege:

5 [T]he party shall make the claim expressly and shall describe
6 the nature of the documents, communication, or things not produced
7 or disclosed in a manner that, without revealing information itself
8 privileged or protected, will engage other parties to assess the
9 applicability of the privilege or protection.

10 Fed.R.Civ.P. 26(b)(5).

11 Blanket assertions of attorney-client privilege are generally disfavored. Grill v.
12 Costco Wholesale Corp., 2004 U.S. Dist. LEXIS 21400, *5 (W.D.Wa. Oct. 8, 2004) *citing*,
13 Clarke v. American Commerce Nat'l Bank, 974 F.2d 127, 129 (9th Cir. 1992); Eureka Financial
14 Corp. v. Hartford Acci. & Indem. Co., 136 F.R.D. 179, 182 (E.D. Cal. 1991). In Grill, the
15 plaintiff did not disclose notes she had made at the direction of her attorney. The court held that
16 she had waived any attorney-client or attorney-work product privilege because, in part, she had
17 only generally asserted privilege objections in her interrogatory answers and did not specifically
18 identify and object to disclosing the documents in question.

19
20 Defendants assert a privilege or privacy claim as an objection to most of the
21 discovery. Nonetheless, assuming, *arguendo*, that Defendants had a legitimate privilege claim,
22 those privileges have been waived by Defendants' failure to produce a privilege log. In re Air
23 Crash at Taipei, 211 F.R.D. 374, 376 (C.D. Cal. 2002), *citing* Clarke v. American Commerce
24 Nat'l. Bank, 974 F.2d 127, 129 (9th Cir. 1992); Davis v. Fendler, 650 F.3d 1154, 1160 (9th Cir.
25 1981).

26
27 PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL WRITTEN
28 AND ORAL DISCOVERY - CIV. NO. 04-02345 JW RS

1 Defendant Boyajian, upon instruction by his counsel, refused to answer several
 2 questions in his deposition. These general objections, made on the grounds of “legal
 3 conclusion,” “expert testimony,” “relevancy,” and “work product,” must fail. Defendant
 4 Boyajian must be compelled to answer these questions.
 5

6 **III. OUTSTANDING DISCOVERY ISSUES**

7 **A. The Amounts Recovered by Defendants** 8 **Through the Use of Exhibits A and B**

9 Plaintiff’s First Discovery Requests, Interrogatory #7 and Document Request #7,
 10 request that the Defendants state the amount of monies recovered through the use of Exhibits A
 11 and B¹ and produce all documents that relate to monies collected through the use of Exhibits A
 12 and B. In response to these requests both Defendants issued identical responses. (Pl. Mot. ¶¶ 5,
 13 8).²
 14

15 Defendants objected to this Interrogatory and Document Request on the grounds
 16 that (1) they were not likely to lead to the discovery of admissible evidence; (2) vague and
 17 ambiguous; and, (3) that the information sought was somehow protected by the United States
 18 Constitution and California Constitution. Defendants also objected to Request for Production #7
 19 on the basis that the information sought was protected by the attorney-client privilege. However,
 20 Defendants produced no privilege log. Plaintiff’s Interrogatories are likely to lead to the
 21
 22

23
 24 ¹ - Throughout this Memorandum, Exhibits A and B refer to Exhibits A and B attached to
 25 Plaintiff’s Complaint.

26 ² - Throughout this Memorandum, Plaintiff refers to his accompanying Motion to Compel as “Pl.
 27 Mot. ¶¶ ____.”

1 discovery of admissible evidence, are not vague or ambiguous and in no way seek information
2 that is protected by any constitutional right. Further, they are relevant and will lead to the
3 discovery of admissible evidence.
4

5 Plaintiff has alleged that Defendants have a pattern and practice of seeking to
6 collect and collecting on time-barred debts through threatening litigation to collect on the time-
7 barred debts. On May 16, 2005, Plaintiff's Motion for Class Certification was granted in part.
8 Abels v. JBC Legal Group, P.C., 227 F.R.D. 541 (N.D.Cal. 2005). This jurisdiction has
9 recognized that threatening litigation on time-barred debts is a violation of the FDCPA. Perretta
10 v. Capital Acquisistions & Mgmt. Co., 2003 U.S. Dist. LEXIS 10070 (N.D. Cal., 2003); Gervais
11 v. Riddle & Assoc., P.C., 363 F.Supp.2d 345 (D.Conn. 2005). Also see, Kimber v. Fed. Fin.
12 Corp., 668 F.Supp.1480 (M.D. Ala. 1987); Walker v. Cash Flow Consultants, 200 F.R.D. 613,
13 615-616 (N.D. Ill. 2001); Shorty v. Capital One Bank, 90 F.Supp. 2d 1330 (D.N.M., 2000); and
14 Stepney v. Outsourcing Solutions, Inc., 1997 U.S. Dist. LEXIS 18264 (N.D.Ill., Nov. 13, 1997).
15 Thus, the amounts collected by Defendants through use of these exhibits is directly relevant and
16 admissible with respect to claims of actual damages. See generally: Black & Veatch Int'l Co. v.
17 Foster Wheeler Energy Corp., 2002 U.S. Dist. LEXIS 990, *3-7 (D.Kan. Jan. 21, 2002).
18
19
20

21 Finding the amounts collected is not burdensome to Defendants. This is especially not
22 burdensome if they subscribe to normal business practices and have an accountant and keep
23 business records. This information is not privileged because it was not created in preparation for
24 litigation, nor communicated privately to Defendants' attorneys.
25
26

1 Defendants' objection based on attorney client privilege and work product
2 privileges are improper as Defendants have failed to comply with the requirements of Fed. R.
3 Civ. P. 26(b)(5). Defendants' documents and records regarding monies collected through the use
4 of Exhibits A and B are relevant and responsive to Plaintiff's request. They must be produced.
5 Any privileged information may be redacted.
6

7 **B. Distribution of Monies Recovered**

8 Plaintiff's First Discovery Requests, Interrogatory #20 seeks information
9 regarding the distribution of monies recovered by Defendants through the use of Exhibits A and
10 B. Once again, both Defendants' responses to the Interrogatory were identical (Pl. Mot. ¶ 6).
11

12 Defendants objected to this Interrogatory on the grounds that (1) it would not
13 likely to lead to the discovery of admissible evidence; (2) vague and ambiguous; and, (3) that the
14 information sought was somehow protected by the United States Constitution and California
15 Constitution. Plaintiff's Interrogatories are likely to lead to the discovery of admissible
16 evidence, are not vague or ambiguous and in no way seek information that is protected by any
17 constitutional right. Further, Defendants provide no basis for their privacy objections.
18
19

20 Plaintiff has alleged that Defendants have a pattern and practice of seeking to
21 collect and collecting on time-barred debts through threatening litigation to collect of the time-
22 barred debts. This jurisdiction has recognized that threatening litigation on time-barred debts is
23 a violation of the FDCPA. *Perretta v. Capital Acquisitions & Mgmt. Co.*, 2003 U.S. Dist.
24 LEXIS 10070 (N.D. Cal., 2003). Also see, *Kimber v. Fed. Fin. Corp.*, 668 F.Supp.1480 (M.D.
25 Ala. 1987); *Walker v. Cash Flow Consultants*, 200 F.R.D. 613, 615-616 (N.D. Ill. 2001); *Shorty*

26 PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL WRITTEN
27 AND ORAL DISCOVERY - CIV. NO. 04-02345 JW RS
28

1 v. Capital One Bank, 90 F.Supp. 2d 1330 (D.N.M., 2000); and Stepney v. Outsourcing Solutions,
 2 Inc., 1997 U.S. Dist. LEXIS 18264. The amounts collected by Defendants through use of these
 3 exhibits is directly relevant and admissible with respect to claims of actual damages. See
 4 generally: Black & Veatch Int'l Co. v. Foster Wheeler Energy Corp., 2002 U.S. Dist. LEXIS
 5 990, *3-7 (D.Kan. Jan. 21, 2002). Finding the amounts collected is not burdensome to
 6 Defendants. This is especially not burdensome if they subscribe to normal business practices and
 7 have an accountant and keep business records. This information is not privileged because it was
 8 not created in preparation for litigation, nor communicated privately to Defendants' attorneys.
 9

10
 11 Defendants' objection based on attorney client privilege and work product
 12 privileges are improper as Defendants have failed to comply with the requirements of Fed. R.
 13 Civ. P. 26(b)(5). Defendants' documents and records regarding monies collected through the use
 14 of Exhibits A and B are relevant and responsive to Plaintiff's request. They must be produced.
 15 Any privileged information may be redacted.
 16

17 **C. Contracts Between Defendants and the Original Creditors**

18 Document Request #3, Plaintiff's First Discovery Requests, seeks documents
 19 regarding Defendants' contract with creditors which resulted in the dissemination of Exhibits A
 20 and B to the Plaintiff and the putative Class. Again, Defendants' responses to the Interrogatory
 21 were identical. (Pl. Mot. ¶ 7).
 22

23 These documents and information are relevant to demonstrate the relationship
 24 between Defendants and the creditors. Defendants' object to this request on the basis that: (1)
 25 the information sought is not likely to lead to the discovery of admissible information; (2) the
 26

1 documents sought are subject to the attorney-client privilege; (3) the request is vague and
2 ambiguous; and, (4) the requests seeks information which constitutes “confidential trade
3 secrets.”
4

5 The requested documents and information are relevant and admissible
6 because they will demonstrate the relationship between Defendants and the creditors and are
7 business records regularly kept in the course of business. Federal Rule of Evidence 803(6); see
8 also: Coppola v. Arrow Financial Svcs, LLC, 2002 U.S. Dist. LEXIS 26788, *6-9 (D.Conn. Oct.
9 29, 2002); Boutvis v. Risk Management Alternatives, Inc., 2002 U.S. DIST. LEXIS 8521, *6
10 (D.Conn. May 3, 2002) (“In determining whether there had been a deceptive or false
11 communication under the FDCPA, the ... Court found that it was appropriate to scrutinize the
12 relationship between the defendant and the entity from which it had acquired the purported
13 debt.”); Kimbro v. I.C. System, Inc., 2002 U.S. DIST. LEXIS 14599, *8-9 (D.Conn. July 22,
14 2002). These documents are not privileged as they were not created in preparation for litigation,
15 nor communicated privately to Defendants’ attorneys. Boutvis v. Risk Management Alternatives,
16 Inc., supra at *8 (“The parties to a debt purchase agreement cannot insulate their practices from
17 discovery ...”). Furthermore, Defendants have failed to comply with the requirements of Fed. R.
18 Civ. P. 26(b)(5). Thus, Defendants’ objections should be overruled. Defendants should be
19 compelled to provide this information and documentation.
20
21
22

23 **D. Documents Relating to Defendants’ Policies and Procedures to Ensure**
24 **Compliance with the FDCPA, CA FDCPA and CUBPA.**
25
26

27 PLAINTIFF’S MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION TO COMPEL WRITTEN
28 AND ORAL DISCOVERY - CIV. NO. 04-02345 JW RS

Document Request # 12 of Plaintiff's First Discovery Requests seeks documents and information regarding the policies and procedures followed by Defendants to ensure compliance with the FDCPA, the CA FDCPA and CUBPA. Defendants again fostered identical responses to the discovery request. (Pl. Mot. ¶ 9).

Defendants claim a bona fide error defense pursuant to 15 U.S.C. 1692k(b)(2)(C).³ Thus, Defendants' objection is frivolous. Defendants cannot raise affirmative defenses seeking to dispel Plaintiff's claims and then refuse to produce evidence, factual or otherwise which supports or disavows those affirmative defenses. Furthermore, one court has compelled a debt collector to respond to nearly identical Interrogatories, *Kimbro v. I.C. System, Inc.*, 2002 U.S. DIST. LEXIS 14599, *8-9 (D.Conn. July 22, 2002). Once again, Defendants' objections based on attorney client privilege and work product privileges are improper as Defendants have failed to comply with the requirements of Fed. R. Civ. P. 26(b)(5). Defendants objection to this Interrogatory is improper and Defendants should be compelled to produce documents responsive to this request.

E. Deposition Questions and Answers

The deposition of Defendant Jack Boyajian⁴ was conducted on May 5, 2005. Throughout the deposition, several questions were asked by Plaintiff's Counsel that the Defendant, upon advice from his Counsel, refused to answer. The objections made by

³ - Defendants' Eighth, Ninth, Fifteenth, Sixteenth, and Twenty-Fourth affirmative defenses appear to be premised, at least in part, on the Bona Fide Error defense set forth in 15 U.S.C. 1692k, *et seq.*

⁴ In Section E, "Defendant" refers only to individual Defendant Jack Boyajian.

1 Defendant's Counsel and Defendant's refusal to answer certain questions are not based upon a
 2 viable privilege and, therefore, are improper. Defendant should be instructed to answer the
 3 questions as outlined below.
 4

5 Federal Rule Civil Procedure, Rule 30(d)(1) provides in pertinent part:

6 Any objection during a deposition must be stated concisely and in a non-argumentative and
 7 non-suggestive manner. A person may instruct a deponent not to answer only when
 8 necessary to preserve a privilege, to enforce a limitation directed by the court, or to present
 a motion under Rule 30(d)(4).

9 **1. Defendant's Objections, Based on "Legal Conclusion,"**
 10 **"Expert Testimony" and "Relevancy,"**
 11 **Must Be Overruled**

12 During his deposition, Defendant Jack Boyajian was asked questions to which his
 13 counsel objected based on "legal conclusion," "expert testimony," and/or "relevancy." The
 14 witness was instructed not to answer the pending questions. These objections are improper,
 15 should be overruled and Defendant should be required to answer the questions.
 16

17 For example, counsel for Defendant instructed him not to answer questions in
 18 reference to the availability and recovery of certain charges. The witness was also instructed not
 19 to answer on the grounds of, *inter alia*, "legal conclusion," "expert opinion," and "relevance."
 20 (Pl. Mot. ¶¶ 10, 11). These objections are patently improper and should be overruled.
 21

22 An attorney can only instruct a witness "not to answer only when necessary to
 23 preserve a privilege, to enforce a limitation directed by the court, or to present a motion under
 24 Rule 30(d)(4)." *Method Elecs, Inc. v. Finisar Corp.*, 205 F.R.D. 552, 553-54 (N.D.Cal. 2001).
 25 Therefore, objections on the grounds of "legal conclusion" and "expert testimony" and
 26

1 “relevancy” are not proper grounds on which to instruct a witness not to answer a question.
2 Fed.R.Civ.Pro. 30(d)(1). The mere fact that an attorney finds a question objectionable does not
3 give them the right to instruct the witness not to answer. As a result, these objections should be
4 overruled and Defendant instructed to answer the questions.
5

6 Additionally, objecting on the ground of “legal conclusion” is only appropriate if
7 the question actually seeks a legal conclusion. In Pullen v. Arrow Financial Services, LLC, 2002
8 U.S.Dist.LEXIS 27823 (D.Conn. Oct. 17, 2002), the plaintiff propounded an interrogatory
9 asking the defendant to state the legal basis for its claimed entitlement to an “NSF Fee.” Pullen
10 v. Arrow Financial Services, LLC, supra at *7. The defendant objected to the interrogatory
11 because, *inter alia*, the interrogatory required the defendant to conduct legal research. Id. at *7-8.
12

13 The Court stated,
14

15 Plaintiff’s interrogatory simply asks for that evidence. She does not
16 seek legal research. She does not seek defendants [sic] legal
17 ‘impressions’ or theories. She seeks facts. The identity of the law
18 that defendant referring to in this letter is a fact. Facts cannot be
19 shrouded from the scrutiny of discovery, especially when they have
20 been put into issues, which is the precisely the case here. Nothing in
21 the Federal Rules of Civil Procedure proscribes this discovery.

22 Id. at *8. The defendant was ordered to supply the requested information within fifteen days. Id.
23

24 In the instant case, Plaintiff asked Defendant “Do you agree that the only way
25 additional statutory penalties could be imposed is through court action?” This question asks
26 whether Defendant agrees with Plaintiff’s statement. It does not require Defendant to conduct
27 legal research or reach a legal conclusion. However, counsel for Defendant instructed her client
28 not to answer the question.

PLAINTIFF’S MEMORANDUM IN SUPPORT OF PLAINTIFF’S MOTION TO COMPEL WRITTEN
AND ORAL DISCOVERY - CIV. NO. 04-02345 JW RS

1 Plaintiff also asked Defendant, after quoting a relevant portion of Defendant's
 2 letter sent to Plaintiff, "To recover those amounts, is it necessary to bring a court action?"
 3 Similarly, this question does not require Defendant to conduct legal research or reach a legal
 4 conclusion; indeed, it merely asks Defendant how he can recover "those amounts."

5
 6 Counsel for Defendant improperly instructed her client not to answer questions
 7 seeking facts—not legal conclusions. Therefore, Defendant should be ordered to answer such
 8 questions.
 9

10 **2. Defendant's Objections, Based on "Work Product,"** 11 **Must Be Overruled**

12 At several points during the deposition Defendant was instructed not to answer
 13 on the basis that the question sought was "work product." For example, this objection was used
 14 in reference to questions about the availability of and methods to recover certain penalties that
 15 Defendants claimed were collectable in their letters to consumers. (Pl. Mot. ¶¶ 10, 11, 12). The
 16 "work product" objection was also used in response to a question regarding the review of letters
 17 by other attorneys. (Pl. Mot. ¶ 13). These objections are improper and should be overruled.
 18 Defendant should be ordered to answer the questions.
 19

20 Once again, a witness may only be instructed not to answer "only when necessary
 21 to preserve a privilege, to enforce a limitation directed by the court, or to present a motion under
 22 Rule 30(d)(4)." The Ninth Circuit acknowledges that the work product doctrine is not an
 23 evidentiary privilege. *Union Pac. R.R. v. Mower*, 219 F.3d 1069, 1076 n8 (9th Cir. 2000) *citing*
 24 *Admiral Ins. Co. v. United States Dist. Court*, 881 F.2d 1486, 1494 (9th Cir. 1988). Therefore,
 25

1 Defendant may not refuse to answer any of Plaintiff's questions based on such grounds.
2 Additionally, Defendant's counsel did not proffer grounds as to why the question requests
3 information that would could be considered "work product." Fed. R. Civ. P. 26(b)(5).
4 Furthermore, a privilege does not attach as the information sought was not created in preparation
5 for litigation, nor communicated privately to Defendant's attorney. Boutvis v. Risk Management
6 Alternatives, Inc., supra at *8 ("The parties to a debt purchase agreement cannot insulate their
7 practices from discovery ...").
8

9
10 Defendant's assertion of the work product doctrine is merely a blanket assertion
11 of a possible privilege, which is disfavored. Grill v. Costco Wholesale Corp., 2004 U.S. Dist.
12 LEXIS 21400, *5 (W.D.WA 2004) *citing*, Clarke v. American Commerce Nat'l Bank, 974 F.2d
13 127, 129 (9th Cir. 1992). Defendant's refusals to answer questions on the basis of work product
14 are improper, the objections should be stricken and Defendant instructed to answer.
15

16 **IV. CONCLUSION**

17 Plaintiff has requested information and documents that are all detailed and clearly
18 relevant to this lawsuit. None of these documents are privileged as none were created in
19 preparation for litigation, nor communicated privately to Defendants' attorneys. Plaintiff
20 requests the Court to compel Defendants to answer interrogatories and produce documents in
21 response to Plaintiff's First Discovery Requests, Interrogatories # 7 and 20, and Request for
22 Production of Documents # 3, 7 and 12. Further, Plaintiff requests the Court to order Jack
23 Boyajian to return to complete his deposition and answer the questions which Defendants'
24 attorney instructed him not to answer.
25

26
27 PLAINTIFF'S MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION TO COMPEL WRITTEN
28 AND ORAL DISCOVERY - CIV. NO. 04-02345 JW RS

Respectfully submitted,

S/ O. Randolph Bragg
O. Randolph Bragg
HORWITZ, HORWITZ & ASSOCIATES
25 East Washington Street, Suite 900
Chicago, IL 60602
(312) 372-8822
(312) 372-1673 (FAX)

RONALD WILCOX
2160 The Alameda, First Floor, Suite F
San Jose, California 95126
(408) 296-0400

ATTORNEYS FOR PLAINTIFF